No. 20,592

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL A. ROBIDA,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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I N D E X

CITATIONS

Cases:

Statutes:

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 129-141) 1/ are not officially reported.

JURISDICTION

This petition for review involves deficiencies in federal income taxes for the years 1956 through 1961, totaling $46,559.55. (R. 4.) The taxpayer filed income tax returns for the taxable years with the District Director of Internal Revenue in Portsmouth, New Hampshire. (Exs. B through G; I-R. 64-104, 130.) On September 18, 1962, the Commissioner mailed a notice of deficiency showing deficiencies in income tax for the six years

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1/ "I-R." and "II-R." references are to Volumes I and II of the record on appeal.

in the total amount of $46,559.55, plus additions to tax totaling $24,583.45 (I-R. 43.) Within 150 days thereafter, 3/ and on December 24, 1962, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiencies, under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-3.) The decision of the Tax Court was entered July 30, 1965. (I-R. 182-183.) The case is brought to this Court by a petition for review filed by the taxpayer on August 25, 1965, within the 3-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. (I-R. 184.) Jurisdiction is conferred on this Court by Section 7482 of that Code. The parties stipulated as to the venue of this Court. (I-R. 192.)

QUESTIONS PRESENTED

1. Did the Tax Court err in determining that the taxpayer failed to report the full amount of his taxable income in each of the years 1956 through 1961?

2. Did the Tax Court err in holding that no portion of the taxpayer's income in the taxable years was exempt from federal taxation under the provisions of Section 911 of the Internal Revenue Code of 1954?

2/ Of this amount, the Commissioner conceded $23,209.79 in fraud penalties in the Tax Court. (II-R. 3.)

3/ Apparently duplicate copies of the notice of deficiency were addressed to the taxpayer at his last known address in California and to him in Germany. (I-R. 4, 43.) Since he was outside the United States when he filed his petition (I-R. 3), a 150-day period applied from the date of the notice of deficiency within which to file a petition to the Tax Court, under Section 6213(a) of the Internal Revenue Code of 1954, as stated in the notice.

3. Is the taxpayer precluded from raising the issue of the statute of limitations on appeal where he did not raise it below; and in any event, would the statute of limitations be inapplicable to bar five of the six taxable years?

4. Did the Tax Court correctly decline to consider the requested abatement of the jeopardy assessment against the taxpayer?

5. Did the Tax Court err in determining that the taxpayer is liable for additions to tax under Code Section 6654 for each of the taxable years for failure to pay any estimated income tax?

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and other authorities are set out in Appendix A, infra.

STATEMENT

The facts as found by the Tax Court (I-R. 129-134) may be summarized as follows:

The following schedule reflects the taxable income and income tax liability reported by the taxpayer on his returns (I-R. 130):

Year	Taxable Income	Tax Liability
1956	$ 889.00	$ 142.24
1957	703.00	112.48
1958	2,162.00	349.62
1959	3,592.37	606.80
1960	4,849.30	886.35
1961	6,255.82	1,262.11
Totals	$18,451.52	$3,359.60

He paid in full the income tax liabilities reported on his returns. (I-R. 130.)

The following schedule reflects the amount of income reported by the taxpayer on his returns as tax exempt under the provisions of Section 911 of the Internal Revenue Code of 1954 (I-R. 131): 4/

Year	Income Reported as Tax Exempt
1956	$ 1,900.00
1957	1,900.00
1958	9,000.00
1959	19,500.00
1960	19,900.00
1961	24,987.00
Total	$77,187.00

This allegedly tax exempt income was reported by the taxpayer on his returns as having been earned income abroad as a sales promoter and instructo in the operation of machines under the terms of an employment agreement with Service Games Ltd. of Gotenda, Tokyo. On the return for 1961, the taxpayer's services under the agreement were described as "repairs of machines by soliciting, teaching and practicing the diagnosing and the manipulating of machines." Service Games Ltd. was a manufacturer of slot machines. The taxpayer never received any income for services or for any other reason from Service Games Ltd. of Gotenda, Tokyo, in the taxable years. (I-R. 131.)

The Commissioner computed the deficiencies herein by the net worth plus nondeductible expenditure method (I-R. 131) as follows (I-R. 132):

4/ In statements attached to the 1960 and 1961 returns the taxpayer stated he should have listed $13,400 instead of $9,000 in 1958 and $21,952 instead of $19,900 in 1960. (I-R. 93, 98, 131.)

	Account No.	Year Ended Dec. 31, 1955	Year Ended Dec. 31, 1956	Year Ended Dec. 31, 1957	Year Ended Dec. 31, 1958	Year Ended Dec. 31, 1959	Year Ended Dec. 31, 1960	Year Ended Dec. 31, 1961
ASSETS:								
Cash								
Rochester Trust Co., Rochester, New Hampshire	56305	$ 11.24	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Industrial City Bank, Worcester, Massachusetts	3235	1,128.01	0.00	0.00	0.00	0.00	0.00	0.00
Morthrift Plan, Sacramento, California	1164	7,390.54	10,136.89	4,912.63	6,468.93	13,566.38	14,107.55	23,444.26
Guardian Thrift and Loan San Francisco, California	249	7,019.60	1,271.75	1,650.48	1,734.06	15,191.89	9,580.18	10,065.22
Schwabacher & Co. San Francisco, California	77193	1,389.04	520.40	(5,308.87)	646.34	(3,823.67)	1,549.81	352.92
Fireside Thrift, San Francisco	3123	0.00	6,060.00	6,304.82	6,559.50	6,824.48	7,136.79	7,463.40
West Coast Savings, Sacramento	7222	0.00	0.00	0.00	0.00	0.00	4,045.75	4,229.92
Morthrift Plan, Stockton, Calif.	5573	0.00	0.00	0.00		0.00	21,802.98	22,239.02
Total Cash		$16,938.43	$17,989.04	$ 7,559.06	$15,408.83	$31,759.08	$58,223.06	$67,794.74
Stock								
Cost of Stock acquired:		$40,354.34	$40,354.34	$40,354.34	$40,354.34	$40,354.34	$40,354.34	$40,354.34
1956			2,617.47	2,617.47	2,617.47	2,617.47	2,617.47	2,617.47
1957				13,932.30	13,932.30	13,932.30	13,932.30	13,932.30
1958					1,217.00	1,217.00	1,217.00	1,217.00
1959						5,044.00	5,044.00	5,044.00
1960							220.00	220.00
1961								9,937.00
TOTAL ASSETS		$57,292.77	$60,960.85	$64,463.17	$73,529.94	$94,924.19	$121,608.17	$141,116.82
LIABILITIES: NONE								
NET WORTH:		$57,292.77	$60,960.85	$64,463.17	$73,529.94	$94,924.19	$121,608.17	$141,116.82
INCREASE IN NET WORTH:			$ 3,668.08	$ 3,502.32	$ 9,066.77	$21,394.25	$ 26,683.98	$ 19,508.64
NONDEDUCTIBLE DISBURSEMENTS:								
Schwabacher & Co., San Francisco, Calif.			$ 5.00	$ 5,103.37	$ 332.91	$ 32.72	$ 12.23	$ 18.20
Morthrift Plan, Sacramento, Calif.			$10,910.00	$ 978.00	$ 0.00	$ 0.00	$ 500.00	$ 50.00
Guardian Thrift and Loan, San Francisco, Calif.			$ 2,245.04	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Personal Living Expenses			$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00
ADJUSTED GROSS INCOME			$21,828.12	$14,683.69	$14,399.68	$26,426.97	$ 32,196.21	$ 24,576.94

The taxpayer introduced no evidence in the Tax Court which would show any error in the Commissioner's net worth computation. (I-R. 133.)

The taxpayer was physically present in the United States from August 1956 to July of 1957. At all other times throughout the years 1956 to 1961, inclusive, he was traveling in Japan, Okinawa, Formosa, Manila, France, Belgium, Germany, Spain, Morocco and Switzerland. While thus traveling, he did not intend to make his home abroad. He lived in hotels and ate in restaurants. He "felt that the cost of living and travel over there was rightfully attributable to my income and deductable from the income that I reported * * *." During this time he visited some 500 military service clubs abroad. In 1959, 1960 and 1961 he paid Miss Inge Muench, who was born and raised in Germany, some $6,000 "for going to clubs with him." At the time she was under twenty-one years of age and most of the time she spent with the taxpayer was in Wiesbaden, Germany. (I-R. 133.)

In some unexplained way the taxpayer claims that he learned through contacts with employees of Service Games Ltd. of Gotenda, Tokyo, how to "manipulate" the slot machines they manufactured so that he was able to receive income from such "manipulation". This "manipulation" was either done by himself in the service clubs he visited or by servicemen who were club members and whom he was "teaching how to diagnose these machines as well as manipulate" them. When the servicemen whom he was "teaching" to "manipulate" the machines themselves played the machines, they did so under an arrangement with the taxpayer that when they collected a jackp it was divided with the taxpayer. The percentage of the division between the taxpayer and the soldier-player varied. If no jackpot was collected, the taxpayer received no payment. (I-R. 133-134.)

The taxpayer engaged in forms of gambling other than playing slot machines, while traveling abroad during the years in question, for substantial sums of money. Whether he won or lost is not established by the evidence. (I-R. 134.)

The evidence does not show that the taxpayer received any wages, salaries or professional fees or other amounts as compensation for personal services actually rendered during the years in question from sources without the United States. (I-R. 134.) In the absence of any evidence to the contrary, the Tax Court (1) sustained the Commissioner's determinations of deficiencies in the years 1956 through 1961; (2) held that the taxpayer had failed to show that any of his income was tax exempt under Section 911 of the Internal Revenue Code of 1954 as earned income received from sources without the United States from wages, salary, professional fees, or as compensation for personal services actually rendered; and (3) sustained the imposition of additions to tax under Code Section 6654 for failure to pay any estimated income tax in the taxable years. (I-R. 134-141.) The taxpayer has petitioned this Court to review the decision of the Tax Court. (I-R. 184.)

SUMMARY OF ARGUMENT

1. The Tax Court found that the Commissioner's determination of deficiencies in income tax for each of the years 1956 through 1961 by use of the net worth plus non-deductible expenditures method of reconstructing income was correct. This finding was based on substantial evidence and has not been shown to be clearly erroneous. The Tax Court's decision was based on an examination of all the record facts and should not be overturned unless clearly erroneous under established standards of review. This Court

has consistently approved of the net worth method as used here by the Commissioner to reconstruct the taxpayer's income. The Commissioner is justified in using the net worth method where a taxpayer's records are non-existent or where they are considered incomplete, inaccurate, or in some manner unsatisfactory. The Tax Court found that the taxpayer produced no records or documentary evidence at all of any materiality to the issues.

The Commissioner was not responsible for the loss of any of the taxpayer's records, and he made photostats of the taxpayer's records in the Internal Revenue Service files available to the taxpayer before the hearing in the Tax Court. He has since given taxpayer's counsel a copy of these photostats and has offered to stipulate to have the case remanded so that the taxpayer could introduce and testify concerning whatever portions of the photostats of these records he might believe to be relevant to his case. The Commissioner made no use of these photostats in computing the net worth statement attached to the notice of deficiency, nor could he have done so since the photostats were necessarily obtained after the taxpayer's records were seized by the German police, which was admittedly a considerable time after the notice of deficiency was mailed. In any event these photstats are not before this Court, and in the light of the taxpayer's failure to produce any other evidence, of his refusal to make use of them in the Tax Court, and of his opposition to remand, we must assume that they would have been of no assistance to him in disproving the deficiencies. As the Tax Court stated, "what they would have shown, had they been available, is nebulous."

The taxpayer did not dispute the Commissioner's net worth computation in the Tax Court, and there admitted that it was substantially correct.

He presented no evidence that any disbursements he disputed were in fact transferred to other accounts, and the Revenue Agent who examined the taxpayer's bank accounts testified that the two disputed disbursements in 1956 could not possibly have been redeposited in any of the taxpayer's other accounts. Furthermore, the taxpayer failed to disprove that the Commissioner's allowance of $5,000 per year for living expenses was at all unreasonable. The evidence shows that in addition to the $1,200 per year which the taxpayer estimated his living expenses to be, he spent large sums for traveling continuously from country to country, for lodging in hotels, for meals in restaurants, and he made payments totalling $6,000 during 3 of the years to a young German girl for accompanying him to clubs. None of these items is deductible. In view of the taxpayer's testimony that he did not intend to establish a home abroad and that he was in a continuous travel status during the years in issue, he is not entitled to deduct any away-from-home travel expenses. It is fair to infer that his admitted expenditures for travel, hotel, meals, and payments to the young German girl, would raise his estimate of his living expenses to at least $5,000 per year. There is no merit to the contention that the Commissioner's opening net worth in 1956 failed to take into consideration certain money and property. The taxpayer did not raise this issue in his petition in the Tax Court, and stipulated to the exact figure used by the Commissioner as the opening net worth in 1956, when he settled prior tax years on a net worth basis ending with 1955. He is precluded now from contending that opening net worth shall be clearly and accurately established by competent evidence. The taxpayer's failure to offer credible explanations of his net worth increases is obviously relevant and material. It is not

incumbent on the Commissioner to disprove all possible sources of non-taxable income, only those actually claimed by the taxpayer.

2. The Tax Court correctly held that no part of the income derived by the taxpayer in each of the years 1956 through 1961 was exempt from taxation under the provisions of Section 911 of the Internal Revenue Code of 1954. As the Tax Court pointed out, inasmuch as the taxpayer failed to introduce any evidence regarding the amount of "earned income" he allegedly derived from foreign countries in each of the years at issue he is not entitled to any exemption under Section 911, even if it were assumed, arguendo only, that slot machine income could be "earned income."

The taxpayer was not a bona fide resident of any foreign country since he did not maintain a real home where he assumed the obligations of a foreign country, and participated in its life and community activities. He admitted at the trial that he did not intend to establish a home in any European country, and also that he had denied to the German authorities that he was a resident of Germany for German income tax purposes.

In any event, income derived abroad from slot machines and cards would not constitute "earned income" entitled to exemption under the provisions of Code Section 911. This section defines earned income as "wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered." The Code recognizes that slot machines are gaming devices. The Commissioner has ruled that gambling income does not constitute "earned income" within the meaning of the statute. There is ample evidence in the record to show that the taxpayer manipulated the slot machines himself. With respect to his contention that he was teaching others how to manipulate them, he could not cite a single instance or name a single person from whom he received

compensation. The Tax Court who heard his testimony did not believe his testimony in this respect. The Commissioner's restrictive interpretation of "earned income" is proper and correct in view of the general purposes of Section 911, which was designed to be a relief provisions to ease the burden imposed on United States citizens by Code Section 61. The special exemption in Section 911 should be strictly construed under the well-established rule of statutory construction that provisions granting relief or special exemption from income taxes are to be strictly construed. Exclusions from gross income are a matter of legislative grace and the burden of showing the right thereto is on the taxpayer. The taxpayer here has failed to show any such right.

3. The taxpayer is precluded from raising the matter of the statute of limitations inasmuch as he did not raise the issue in the Tax Court. Here, for the first time, he seeks to raise the issue for the first three taxable years (1956 through 1958). He has not attempted to raise this issue with respect to 1959 through 1961, nor could he do so, since the notice of deficiency was mailed within the usual three year statutory period provided in Section 6501(a) of the 1954 Code. The general rule is that questions not raised in the trial courts may not be considered in the appellate courts. No reason has been advanced here for making any exception, and it is submitted that the facts of the instant case do not warrant doing so. It has frequently been held that the defense of the statute of limitations may not be raised for the first time in the Court of Appeals when not pleaded in the Tax Court. No exceptional circumstances exist here which would warrant any different holding.

Moreover, the assessment of the deficiencies asserted against the taxpayer would not be barred for five of the six taxable years, even if

the taxpayer had raised the issue below. Section 6501(e)(1) provides that if a taxpayer omits an amount in excess of 25 percent of his gross income as stated in the return, the tax may be assessed at any time within six years after the return was filed. As to 1956 and 1957, the taxpayer clearly omitted more than 25 percent of the amounts he disclosed on his returns, even including the sums he contended were tax exempt under Section 911 of the Code. As to 1958, the asserted deficiency also exceeds the total amount disclosed, but not by 25 percent. However, inasmuch as the taxpayer failed to raise the issue of the statute of limitations in the Tax Court, he is precluded from doing so for the year 1958, as well as for all other years, for the first time at this stage of the proceedings. In the event that this Court should decide to remand the case to the Tax Court, the Commissioner would have no objection to this Court entering an order directing the Tax Court to permit the taxpayer to amend his petition so as to raise the issue of the statute of limitation as to 1958.

4. The Tax Court correctly declined to consider the requested abatement of the jeopardy assessment against the taxpayer. The jeopardy assessment was made prior to the issuance of a notice of deficiency, and the Commissioner duly issued his notice of deficiency within sixty days as required by Section 6861(b) of the 1954 Code. The Tax Court correctly stated that it had no authority to consider the jeopardy assessment or to abate it. The Commissioner is authorized to make a jeopardy assessment u Section 6861(a) of the Code, and the making of such an assessment is a di cretionary prerogative which the District Director may make whenever he believes that collection of the tax will be jeopardized by delay. The

courts have declined to inquire into his belief or in any way substitute their judgment for his. The taxpayer's institution of proceedings in the Tax Court and his appeal to this Court in no way operate to stay the Commissioner's hand from enforcing the jeopardy assessment in the absence of a bond. Prior to the Tax Court's decision, the taxpayer could have filed an application for abatement under Section 6861(g) with the District Director, fully stating the reasons why he believed jeopardy does not exist, and giving supporting evidence. The Tax Court had jurisdiction to determine overpayments during the taxable years, and under Section 6861(f) of the Code at the conclusion of these proceedings, if the amount already collected exceeds the amount determined as the amount which should have been assessed, the excess will be credited or refunded to the taxpayer, without the necessity of filing a claim therefor. This Court, however, should deny the taxpayer's request to consider the jeopardy assessment, and should decline to order the Commissioner to return the money seized.

5. The Tax Court correctly sustained the Commissioner's additions to tax under Section 6654 of the Code for the taxpayer's failure to file declarations of estimated tax for the years 1956 through 1961. Although he was required to file declarations of estimated tax by Section 6015 of the Code, the taxpayer filed no declarations during any of the taxable years, and at the trial made no explanation of why he did not file them. The Tax Court necessarily sustained the Commissioner's determination of liability. The imposition of the additions to tax for failure to file declarations has frequently been sustained by the courts. It is submitted that the Tax Court correctly affirmed their imposition against the taxpayer.

ARGUMENT

I

THE TAX COURT FOUND THAT THE COMMISSIONER'S DETERMINATION OF DEFICIENCIES IN INCOME TAX FOR EACH OF THE YEARS 1956 THROUGH 1961 BY USE OF THE NET WORTH PLUS NON-DEDUCTIBLE EXPENDITURES METHOD OF RECONSTRUCTING INCOME WAS CORRECT AND THIS FINDING WAS BASED ON SUBSTANTIAL EVIDENCE AND HAS NOT BEEN SHOWN TO BE CLEARLY ERRONEOUS

The principal issue in this appeal is whether there is substantial evidence to support the deficiencies in income tax of the taxpayer as found by the Tax Court for each of the years 1956 through 1961. The Commissioner utilized the net worth plus non-deductible expenditures method in determining that the taxpayer had deficiencies in income tax for the years 1956 through 1961. (I-R. 43-63.) The Tax Court, after examining the record, which consisted of testimony and exhibits, upheld the Commissioner's determinations. (I-R. 129-141.) The Commissioner submits that the Tax Court decision was based on an examination of all the record facts and should not be overturned unless clearly erroneous under established standards of review. Commissioner v. Duberstein, 363 U.S. 278, rehearing denied, 364 U.S. 925; United States v. Gypsum Co., 333 U.S. 364, 395; Baumgardner v. Commissioner, 251 F. 2d 311 (C.A. 9th); Rule 52(a), Federal Rules of Civil Procedure; Section 7482 of the Internal Revenue Code of 1954.

This Court has consistently approved of the net worth method as used here by the Commissioner to reconstruct the taxpayer's income. 5/

5/ Among the cases in which this Court has approved the use of the net worth method are the following: Heider v. United States, 347 F. 2d 695; Baumgardner v. Commissioner, supra; Showell v. Commissioner, 238 F. 2d 148; Sterns v. Commissioner, 235 F. 2d 584; Gobins v. Commissioner, 217 F. 2d 952 Rose v. Commissioner, 188 F. 2d 355, certiorari denied, 342 U.S. 850; Estate of Gaviati v. Commissioner, 127 F. 2d 861.

The Commissioner is justified in using the net worth method where a taxpayer's records are non-existent or where they are considered incomplete, inaccurate, or in some manner unsatisfactory. United States v. Johnson, 319 U.S. 503, rehearing denied, 320 U.S. 808; Bryan v. Commissioner, 209 F. 2d 822 (C.A. 5th), certiorari denied, 348 U.S. 912. Here the Tax Court found that the taxpayer produced no records or documentary evidence at all of any materiality to the issues. 6/ The Tax Court leniently had allowed the taxpayer to testify at length, even concerning issues he had not raised in his petition, probably because he was not represented by counsel.

6/ The taxpayer's brief attempts to make the Commissioner responsible for the fact that the taxpayer did not have certain records at the time of the Tax Court hearing. (Br. 3.) In the Tax Court, the taxpayer stated (II-R. 39, 57-58, 63, 82) that the Germans seized his records in July 1963 (I-R. 41) at the time he was arrested in Germany in connection with charges unrelated to the instant case, and expelled from the country in November 1963 (I-R. 111). Now he falsely states that the Germans got his records from the Internal Revenue Service. (Br. 3.) The record citation given fails to support any such accusation. Documents attached to the Commissioner's answer to the taxpayer's Motion in Opposition to Motion to Remand and Motion for Final Judgment, Appendix B, infra, forwarded to this Court August 22, 1966, clearly show that the only material of the taxpayer in the possession of the Internal Revenue Service at the time of the trial in the Tax Court was in the form of photostats of certain documents obtained by the Office of International Operations from the German police, and that the originals of such documents were held by the German police until they were borrowed by the Office of International Operations in May 1966. The affidavit of Mr. Ciranni, who tried the case in the Tax Court, states clearly, Appendix B, infra, that the taxpayer was permitted to inspect the photostats of the five notebooks on three occasions; and that the taxpayer was advised that he could examine them whenever he wished and could rely on them in any manner, but that the Commissioner could not introduce the photostats into evidence because they were not properly authenticated and the taxpayer would not stipulate as to their accuracy. The taxpayer did not choose to make a formal demand on the Commissioner for these photostats. (Br. 12.)

The Commissioner did not use any of the photostats of the taxpayer's records held by the German police in computing the net worth statement attached to his notice of deficiency, and could not have done so since the notice is dated September 18, 1962 (I-R. 43) and the seizure of the taxpayer's records by the German police was not until July 1963 (I-R. 41); and whatever copies of the records which are in the Internal Revenue Service files necessarily were obtained subsequent to such seizure.

(continued on following page)

The taxpayer did not dispute the amount of the Commissioner's net worth computation in his petition (I-R. 1-3) as the Tax Court pointed out (I-R. 135), and, in fact, at the Tax Court hearing admitted that the computation was substantially correct (II-R. 39). The taxpayer's brief falsely accuses the Commissioner of wrong-doing and harrassment in connection with matters totally unrelated to the instant case (Br. 2-13), argues at length concerning an issue no longer in the case 7/ (Br. 3, 8-11) and erroneously seeks to shift the burden of proof to the Commissioner (Br. 8-10). He contends (Br. 3-4) that his records would show disbursements from bank accounts, that the Commissioner allegedly relied on them to prove living expenses, but that these disbursements were actually merel transfers of money from one account to another or redeposits of the same

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6/ (continued from preceding page)

In the interest of fairness, since the taxpayer was not represented by counsel in the Tax Court, on May 13, 1966, counsel for the Commissioner furnished the taxpayer's counsel with a xeroxed copy of the photostats of the taxpayer's five diaries which had been transmitted with the Internal Revenue Service files in this case, and offered to stipulate with the taxpayer's counsel that the case be remanded so that he might offer into evidence and testify concerning such portions, or all, of the copies of the diaries which he believes may be relevant to his case. As this Court knows, the taxpayer refused to so stipulate, and opposed the Commissioner' Motion to Remand the Case to the Tax Court for this purpose.

For the convenience of the Court, the Commissioner's Motion to Remand and his Answer to the taxpayer's Motion in Opposition to Motion to Remand and Motion for Final Judgment, with supporting affidavit, are reproduced in Appendix B, infra.

7/ As indicated in fn. 2, supra, the Commissioner conceded fraud penalties in the Tax Court (II-R. 3), but the brief of the taxpayer continues to discuss fraud in his brief filed in this Court.

money. There is no merit to these contentions. It is submitted that the taxpayer had full opportunity to use whatever copies of his records the Internal Revenue Service files contained (see fn. 6, supra), and that there is nothing in the record to make the Commissioner responsible in any way for the taxpayer's loss of his records, as falsely alleged. (Br. 8.) Since the taxpayer inconsistently now contends he cannot rely on the copies of his records furnished to him (see fn. 6, supra), we must assume that whatever records he kept would not have been of assistance to him in disproving the deficiencies. As the Tax Court stated (I-R. 136), "what they would have shown, had they been available, is nebulous."

As the Tax Court indicated during the trial (II-R. 39), the taxpayer disputed only 3 items in the Commissioner's net worth statement: namely, the $5,000 per year living expense item, and the non-deductible disbursements in 1956 of $10,910 and $2,245.04 (I-R. 63). In fact, the taxpayer admitted at the trial (II-R. 39) that he did not "see any reason to dispute" the other items in the Commissioner's net worth statement. Naturally, since all the items are based on records of banks and other financial institutions located in the United States, which the taxpayer could easily inspect, it is obvious that he could have no reason to dispute the other items. He failed to present specific evidence that any disbursements were, in fact, transferred to other accounts, whereas Revenue Agent Shamberger testified (II-R. 102-104) that his examination of the taxpayer's various bank accounts established that the two disputed disbursements in 1956 could not possibly have been redeposited in any of the taxpayer's other accounts. Although no evidence was presented as to how these disbursements were expended by the taxpayer, it is probable that he used the money to pay his living expenses during the period he was in the

the United States and from the United States to Germany. He may also have used a large part of it to finance his activities in Germany after he arrived there in 1957.

With respect to the $5,000 per year used by the Commissioner to represent the taxpayer's living expenses, it is clear that the taxpayer spent sums substantially in excess of that amount every year for personal, non-deductible purposes. The only direct testimony concerning the taxpayer's cost of living consisted in his self-serving testimony to the effect that he spent only $1,200 per year as living expenses. His estimate, however, admittedly did not include amounts he paid for personal expenses such as food and lodging, which he erroneously considered to be deductible items. (II-R. 45-47.) His testimony concerning amounts he deducted for such items is vague at best. Furthermore, he testified (II-R. 45) that he did not include in his estimate the cost of traveling continuously from country to country, which he likewise deducted before reporting any income to the Government. He traveled continuously in the taxable years between more than 500 military installations in Germany, Belgium, France, Spain, Morocco, Japan, Okinawa, Formosa, and Manila. (II-R. 35-37, 45-47.)

In addition, Miss Inge Muench testified (II-R. 85) that the taxpayer gave her $6,000 between 1959 and 1961 for going to clubs with him. Neither this amount nor any similar sums he might have spent in the taxable years 1956 through 1958 were included in the taxpayer's estimate of his living expenses. In view of the taxpayer's testimony that he has no home in the United States (II-R. 44) and that he did not intend to establish one in Europe (II-R. 35), he was in a continuous travel status during the years at issue and is not entitled to deduct any "away from home" travel expenses United States v. Mathews, 332 F. 2d 91 (C.A. 9th); James v. United States,

308 F. 2d 204 (C.A. 9th); Fisher v. Commissioner, 230 F. 2d 79 (C.A. 7th). The Commissioner's determinations of the estimated living expenses are presumptively correct, and the taxpayer has the burden of showing them incorrect. Welch v. Helvering, 290 U.S. 111, 115; Zeddies v. Commissioner, 264 F. 2d 120, 126 (C.A. 7th), certiorari denied, 360 U.S. 910, rehearing denied, 361 U.S. 855. After careful consideration of the record, the Tax Court reasonably sustained the Commissioner's determination that the taxpayer's living expenses were at least $5,000 a year. The Tax Court's findings, being based on the record evidence, were entirely reasonable. Millikin v. Commissioner, 298 F. 2d 830 (C.A. 4th). It was not bound to believe or accept the testimony of the taxpayer, particularly in view of his self interest. Mendelson v. Commissioner, 305 F. 2d 519 (C.A. 7th), certiorari denied, 371 U.S. 877; Banks v. Commissioner, 322 F. 2d 530 (C.A. 8th), certiorari denied, 350 U.S. 986; Burka v. Commissioner, 179 F. 2d 483 (C.A. 4th). It is fair to infer that the taxpayer's admitted expenditures for travel, hotels and meals, as well as for Miss Muench's payments, none of which he included in his $1,200 per year estimate for living expenses, would raise this amount to at least $5,000 per year.

The taxpayer here contends (Br. 11) that the Commissioner's opening net worth failed to take into consideration cash on hand, automobiles, and personal property. The taxpayer did not raise this point in his petition in the Tax Court, and only vaguely referred to it at the trial in the Tax Court. (II-R. 74-75.) The approval by the Tax Court of the Commissioner's determination of opening net worth was a determination of fact which has not been shown to be clearly erroneous and should be sustained. Halle v. Commissioner, 175 F. 2d 500, 503 (C.A. 2d), certiorari denied, 338 U.S. 949. Moreover, there is no evidence in the record warranting an allowance of undeposited cash. Furthermore, the taxpayer stipulated to $57,292.77

used by the Commissioner as the opening net worth in 1956. As the record shows and the taxpayer admits (II-R. 68, 73-74; I-R. 36, 177), the taxpayer's liabilities for prior taxable years (1949-1955) were settled on a net worth basis in 1957. Mr. Lee, who represented the Internal Revenue Service in that settlement, testified (II-R. 74-75) that the taxpayer had never contended in that prior settlement that there should be an allowance for cash on hand in the closing net worth. As Mr. Cirrani, the attorney who tried the instant case in the Tax Court, explained to the court (II-R. 12), and as the taxpayer admits (II-R. 73-74), the opening net worth for 1956 in the Commissioner's statement of deficiency for the instant taxable years ($57,292.77, I-R. 132) was based on the closing net worth for 1955 in the prior case where the same sum was stipulated. The taxpayer is precluded now from contending that what he agreed to as his closing net worth in 1955 was not the opening net worth for 1956, the first of the instant taxable years. An opening net worth stipulated by the parties clearly satisfies the requirement that an opening net worth shall be clearly and accurately established by competent evidence. Cefalu v. Commissioner, 276 F. 2d 122 (C.A. 5th); Shaw v. Commissioner, 252 F. 2d 681 (C.A. 6th); United States v. Fenwick, 177 F. 2d 488 (C.A. 7th).

The taxpayer's failure to offer credible explanations of his net worth increases is obviously relevant and material. The Government's burden is to present "effective negations of reasonable explanations by the taxpayer inconsistent with guilt" and to "track down relevant leads furnished by the taxpayer." Holland v. United States, 348 U.S. 121, 135, rehearing denied, 348 U.S. 932. It is not incumbent on the Commissioner to disprove all possible sources of nontaxable income, only those actually

claimed by the taxpayer. United States v. Massei, 355 U.S. 595; Ferris v. Commissioner, 317 F. 2d 333 (C.A. 2d); Gatling v. Commissioner, 286 F. 2d 139, 144-145 (C.A. 4th); Commissioner v. Thomas, 261 F. 2d 643, 646 (C.A. 1st).

II

THE TAX COURT CORRECTLY HELD THAT NO PART OF THE INCOME DERIVED BY THE TAXPAYER IN EACH OF THE YEARS 1956 THROUGH 1961 WAS EXEMPT FROM TAXATION UNDER THE PROVISIONS OF SECTION 911 OF THE INTERNAL REVENUE CODE OF 1954

The taxpayer contends that a large portion of the deficiency is income earned abroad when he was allegedly a resident of Germany and that such income was tax exempt under Section 911 of the Internal Revenue Code of 1954, Appendix A, infra. (Br. 3.) The Tax Court held (I-R. 136-140) that the record fails to show that any of the taxpayer's income was tax exempt, because the taxpayer had failed to show how much of his income was allegedly exempt under Section 911 of the 1954 Code and also that any of the income he derived abroad was "earned income" entitled to any tax exemption under that section of the Code. It is submitted that the Tax Court's findings were entirely correct.

As the Tax Court pointed out (I-R. 137), the taxpayer's testimony adds up to arguing that some amounts of his income received were allegedly earned as personal services actually rendered, but there is no evidence in the record which permitted the Tax Court even to guess how much money was so claimed. Even if it were assumed, arguendo only, that slot machine income derived abroad is exempt from taxation under the provisions of Section 911, the taxpayer obviously is not entitled to any exemption unless he first establishes exactly how much income he allegedly derived from that source in each of the years at issue. Inasmuch as he failed to introduce any

evidence regarding the amount of this income, he is not entitled to any exemption under Section 911. Section 911(a)(1) of the 1954 Code provides that an individual citizen of the United States may exclude from his gross income amounts up to $20,000 received from sources outside the United States are exempt from taxation if he establishes to the satisfaction of the Secretary of the Treasury that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which include an entire taxable year. The legislative history of Section 911 indicates that since 1942 this section has not been intended to benefit all persons with respect to income derived outside the United States, but only a bona fide resident of a foreign country or countries. See Section 148 of the Revenue Act of 1942, c. 619, 56 Stat. 798; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54, 116 (1942-2 Cum. Bull. 504, 505, 591); H. Confere Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942-2 Cum. Bull. 701, 708); Downs v. Commissioner, 166 F. 2d 504, 508 (C.A. 9th), certiorari denied, 334 U.S. 832, rehearing denied, 335 U.S. 837. As used in the legislative history, "bona fide residence" means a maintenance of a real home establis ment by a person who is physically present in a foreign country over a period of years and who assumes the obligations of such home, including the payment of taxes, and participation in the life and activities of the community. The taxpayer testified that during the taxable years he was continuously traveling between military installations in some ten countrie (II-R. 35-37, 45-47), and that he did not intend to establish a home in ar of them (II-R. 35). He now contends (Br. 3) that he was a resident of Germany. Although he may have been physically present longer in Germany than in any other of the countries he visited, he admittedly denied to the German authorities that he was a resident of Germany for German incom

tax purposes. (II-R. 62, 63.) 8/ Furthermore, he lived in hotels, ate in restaurants, maintained no permanent address (II-R. 35-37), and deposited all his income in financial institutions located in the United States (I-R. 63

It is submitted that the taxpayer's income from slot machines and cards derived abroad in any case would not constitute "earned income" entitled to exemption under the provisions of Section 911 of the 1954 Code. Section 911(b) of the 1954 Code defines "earned income" as "wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered." There were misleading statements on the taxpayer's returns indicating that income was from a manufacturer of slot machines in Japan. In 1956, he attached a statement to his return (I-R. 68) stating that $1,900 was exempt under Section 911 "which was earned as a result of labor performed while a resident of Japan from October 18, 1954 to August 1, 1956." On his 1957 return, he stated (I-R. 71, 74) that he received $1,900 tax exempt foreign income which he had earned "as sales promoter and instructor in the operation of machines, as under the terms of employment agreement with Service Games Ltd. of Gotenda, Tokyo," In 1958 and 1959 his returns stated (I-R. 81, 86) he had earned $9,000 and $19,000 respectively while "Employed as sales promoter, solicitor and instructor and teaching operation of machines etc. as under terms of agreement with Service Games Ltd. of Gotenda, Tokyo." On his 1960

8/ It should be noted that under Section 911(c)(6) of the 1954 Code, added by Section 11(a), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, which was not in effect during the years at issue, the taxpayer's denial to the German authorities that he was a German resident would be conclusive evidence that he was not a bona fide resident of Germany, if the German authorities subsequently found him not subject to German income tax.

return, he stated that in 1958 he should have stated his foreign income was $13,400 instead of $9,000 (I-R. 92, 93), and for 1960 he reported $19,900 as tax exempt while "employed in promoting sales and repair of machines by operating, soliciting, demonstrating and teaching operation of machines etc. as under terms of agreement with Service Games Ltd. of Gotenda, Tokyo" (R. 93). In 1961, he stated his allegedly tax exempt income in 1960 should have been $21,952, and reported for 1961, $24,987 as exempt income while "Employed promoting sales and repairs of machines by soliciting, teaching and practicing the diagnosing and the manipulatic of machines, as under the terms of agreements with Service Games Ltd. of Gotenda, Tokyo." (I-R. 97, 98.)

Contrary to these sworn allegations, at the trial in the Tax Court the taxpayer admitted he had received no income whatsoever from Service Games Ltd. during the taxable years (II-R. 48) but he then testified that he earned income from teaching soldiers how to diagnose and manipulate sl machines under various oral agreements whereby he usually received the jackpots (II-R. 31). He was, however, unable to cite a single instance or name a single person from whom he received compensation for teaching how to manipulate the slot machines. There is, on the contrary, abundant evidence in the record to show that admittedly the taxpayer personally manipulated the machines. (II-R. 32, 52, 53, 61, 66.) The Tax Court concluded (I-R. 139), that even if the taxpayer's story were believed, which the Tax Court declined to do, "It was a type of joint venture betw petitioner and the soldiers--not a payment to petitioner by the soldiers for personal services which he rendered to them."

We submit that the Tax Court was clearly correct, and that none of the income which the taxpayer received abroad was "earned income" within

he meaning of the statute so as to be exempt from taxation under Section
11 of the 1954 Code. Section 4462(a)(2) of the Internal Revenue Code
f 1954, Appendix A, infra, recognizes that slot machines are gaming
evices. Rev. Rul. 55-171, 1955-1 Cum. Bull. 80, 87, Appendix A, infra,
pecifically excludes gambling income from the compass of "earned income"
tating (p. 87):

> Sec. 7. Earned Income.
>
> .01 Compensation for personal services rendered.--The term "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered. It does not include such income as dividends, other distributions of corporate earnings or profits, gambling gains, interest, rents, or gains or profits from dealing in real or personal property. * * * (Emphasis supplied.)

his restrictive interpretation of "earned income" is proper and correct,
n view of the general purpose of Section 911. This section was designed
y Congress to be a relief provision, to ease the burden imposed on
nited States citizens by Section 61 of the 1954 Code, Appendix A, infra,
o report income regardless of where it may be earned. The special exemption
rovisions of Section 911 should be strictly construed under the well-
stablished rule of statutory construction that provisions granting relief
r special exemption from income taxes are to be strictly construed. United
tates v. Stewart, 311 U.S. 60, 71. Exclusions from gross income are a
atter of legislative grace and the burden of showing the right thereto
s on the taxpayer. Interstate Transit Lines v. Commissioner, 319 U.S. 590,
93, rehearing denied, 320 U.S. 809; Jones v. Kyle, 190 F. 2d 353 (C.A. 10th),
ertiorari denied, 342 U.S. 886.

III

THE TAXPAYER IS PRECLUDED FROM RAISING THE MATTER OF THE STATUTE OF LIMITATIONS INASMUCH AS HE DID NOT RAISE THE ISSUE IN THE TAX COURT; AND IN ANY EVENT THE ASSESSMENT OF THE DEFICIENCIES ASSERTED AGAINST THE TAXPAYER WOULD NOT BE BARRED FOR FIVE OF THE TAXABLE YEARS

The taxpayer did not raise the issue of the statute of limitations in the Tax Court, and consequently neither the briefs filed in the Tax Court nor the findings of fact and opinion of the Tax Court discuss it. Here, for the first time, the taxpayer contends (Br. 9) that the first three taxable years (1956 through 1958) are barred by the statute of limitations. He does not attempt to raise the issue with respect to the years 1959, 1960, and 1961, nor could he do so, since the notice of deficiency was mailed September 18, 1962, or within the usual three year statutory period, provided in Section 6501(a) of the 1954 Code.

The general rule is that questions not raised in the trial courts may not be considered in the appellate courts. Helvering v. Wood, 309 U.S. 344; Helvering v. Tex-Penn Oil Co., 300 U.S. 481; Helvering v. Salvage, 297 U.S. 106; General Utilities Co. v. Helvering, 296 U.S. 200, 206; Duignan v. United States, 274 U.S. 195, 200; Shedd's Estate v. Commissioner, 320 F. 2d 638, 640-641 (C.A. 9th); Vogel's Estate v. Commissioner, 278 F. 2d 548, 550 (C.A. 9th); Bank of California v. Commissioner, 133 F. 2d 428, 430 (C.A. 9th). In Hormel v. Helvering, 312 U.S. 552, 558, the Supreme Court recognized an exception to the general rule where the obvious result would be a plain miscarriage of justice. See also MacRae v. Commissioner, 294 F. 2d 56, 59 (C.A. 9th), certiorari denied, 368 U.S. 955. No reason has been advanced in this

case for making an exception, and it is submitted that the facts of the taxpayer's case do not warrant doing so.

It has frequently been held that the defense of the statute of limitations may not be raised for the first time in the Court of Appeals when not pleaded in the Tax Court. Reeves v. Commissioner, 314 F. 2d 438 (C.A. 1st); Rice v. Commissioner, 295 F. 2d 239, 240 (C.A. 5th); Given v. Commissioner, 238 F. 2d 579, 583 (C.A. 8th); Covington v. Commissioner, 103 F. 2d 201 (C.A. 5th); Austin Co. v. Commissioner, 35 F. 2d 910, 912 (C.A. 6th), certiorari denied, 281 U.S. 735. No exceptional circumstances exist here which would warrant any different holding.

Moreover, the assessment of the deficiencies asserted against the taxpayer would not be barred by the statute of limitations in any event in five of the six years. Section 6501(e)(1) of the 1954 Code, Appendix A, infra, provides that if a taxpayer omits an amount in excess of 25% of his gross income as stated in the return, the tax may be assessed at any time within six years after the return was filed. It is recognized that subsection (e)(1)(A) (ii) of this part of the Code provides that in determining the amount omitted from gross income there shall not be taken into account any amount which is omitted from gross income stated in the return if the amount is disclosed in the return, or in a statement attached to it, so as to advise the Secretary or his delegate of the nature and amount of the item. As discussed in Point II of this Argument, supra, the taxpayer contended in his returns that various amounts were deductible as foreign income earned abroad under Section

911 of the Code, and did not include them in his gross income. The following table shows the amounts reported as taxable in the years in question, the additional amounts disclosed, and the amounts of the deficiencies asserted by the Commissioner (I-R. 45, 48, 52, 130, 131):

Years	1956	1957	1958
Amount reported taxable on returns	$ 889	$ 703	$ 2,162
Amount disclosed on returns as allegedly tax exempt	1,900	1,900	9,000
Total amount disclosed on returns	2,789	2,603	11,162
25 per cent of total amount disclosed on returns	697.25	650.75	2,790.50
Deficiencies asserted by Commissioner in statutory notice	20,178.12	13,033.69	12,749.68
Amount by which deficiencies exceed total amount disclosed	17,389.12	10,430.69	1,587.68

Since the deficiencies asserted by the Commissioner and affirmed by the Tax Court have not been shown to be clearly erroneous, as discussed above in Points I and II of this Argument, it is obvious that for 1956 and 1957 the taxpayer omitted more than 25 per cent of the amounts he disclosed on his returns. Even as to 1958, the asserted deficiency exceeds the amount disclosed on the return, but in that year not by 25 per cent. However, inasmuch as the taxpayer failed to raise an issue with respect to this issue in the Tax Court, he is precluded from doing

so for 1958 for the first time at this stage of the proceedings. In the event this Court should decide to remand this case to the Tax Court (See Appendix B, infra), the Commissioner would have no objection if this Court should direct the Tax Court to permit the taxpayer to amend his petition so as to raise the issue of the statute of limitations as to 1958. As to the other five years, the assessment of the deficiencies asserted against the taxpayer would not have been barred even if he had raised the issue below, so that it would be of no assistance to him to raise the issue as to those years on remand.

IV

THE TAX COURT CORRECTLY DECLINED TO CONSIDER THE REQUESTED ABATEMENT OF THE JEOPARDY ASSESSMENT AGAINST THE TAXPAYER

The taxpayer requests (Br. 13) that this Court order the Commissioner to return to him the monies seized from him by jeopardy assessment. As stated in the notice of deficiency (I-R. 44), a jeopardy assessment had been made against the taxpayer on August 14, 1962. Since it was made prior to the issuance of a notice of deficiency, the Commissioner duly issued his notice of deficiency on September 18, 1962, and within 60 days, as required by Section 6861(b) of the 1954 Code, Appendix A, infra. The taxpayer's petition, while mentioning that the jeopardy assessment had been made, and requesting the return of the money seized (I-R. 1, 3), did not deny the authority of the Commissioner to make it, nor, indeed, did it advance any reasons why jeopardy did not exist. During the trial, the taxpayer sought to

bring the matter of the jeopardy assessment into the case (II-R. 6, 16), and the Tax Court correctly stated (II-R. 16) that it had no authority to consider the jeopardy assessment, or to abate it.

The Commissioner is authorized to make such an assessment under Secti 6861(a) of the 1954 Code, Appendix A, infra. The making of a jeopardy assessment is a discretionary prerogative of the Secretary of the Treasury or his delegate. Phillips v. Commissioner, 283 U.S. 589, 596, fn. 599; Cohen v. United States, 297 F. 2d 760 (C.A. 9th), certiorari denied, 369 U.S. 865; Ginsburg v. United States, 278 F. 2d 470 (C.A. 1st), certiorari denied, 364 U.S. 878; Homan v. Long, 242 F. 2d 645 (C.A. 7th). It has the force of a judgment. Citizens Nat. Trust & S. Bank of Los Angeles v. United States, 135 F. 2d 527, 528 (C.A. 9th). Thus the District Director may make a jeopardy assessment whenever he believes that collection of the tax will be jeopardized by delay, and the exercise of the broad discretionary power is left to his personal judgment and opinion. The courts have declined to inquire into the District Director' belief or in any way substitute their judgment for that of the District Director. Cohen v. United States, supra; Lloyd v. Patterson, 242 F. 2d 742, 743-744 (C.A. 5th); Hilinski v. Commissioner, 237 F. 2d 703, 704 (C.A. 6th); Darnell v. Tomlinson, 220 F. 2d 894 (C.A. 5th). 9 Mertens, Law of Federal Income Taxation, Sec. 49.145, pp. 232-233. In this case, the taxpayer was out of the country, and engaged in an unusual and somewhat precarious type of occupation. The District Director may well have believed that the taxpayer might transfer or gamble away his assets so as to jeopardize the collection of his income taxes.

The taxpayer's institution of proceedings in the Tax Court and his appeal to this Court in no way operate to stay the Commissioner's hand from enforcing a jeopardy assessment in the absence of a bond. See Cohen v. United States, supra.

Under Section 6861(c), Appendix A, infra the Secretary or his delegate may abate a jeopardy assessment to the extent that the District Director believes it to be excessive, or to the extent that the taxpayer proves that no jeopardy exists, but no such authority exists after a Tax Court decision has been rendered. Prior to the Tax Court decision, the taxpayer could have filed an application for abatement with the District Director on the ground that jeopardy does not exist, fully stating the reasons and giving supporting evidence for the request. Darnell v. Tomlinson, supra; Treasury Regulations on Procedure and Administration (1954 Code), Sec. 301.6861-1(e) and 301.6861-1(f)(3). There is nothing to indicate that he ever filed such an application, or offered to file a bond.

Section 6512 of the 1954 Code, Appendix A, infra, gave the Tax Court jurisdiction to determine overpayments during the taxable years (I-R. 182-183), and pursuant to Section 6861(f) of the 1954 Code, at the conclusion of these proceedings, if the amount already collected exceeds the amount determined as the amount which should have been assessed, the excess will be credited or refunded to the taxpayer, as provided in Section 6402 of the 1954 Code, without the necessity of filing a claim therefor. This Court, however, should deny the taxpayer's request to consider the jeopardy assessment and should decline

to order the Commissioner to return the monies seized.

V

THE TAX COURT CORRECTLY IMPOSED ADDITIONS TO TAX UNDER SECTION 6654 OF THE 1954 CODE FOR THE TAXPAYER'S FAILURE TO FILE DECLARATIONS OF ESTIMATED TAX FOR THE YEARS 1956 THROUGH 1961

Section 6654 of the 1954 Code, Appendix A, infra, provides that in the case of any underpayment of estimated tax by an individual, with exceptions not pertinent here, specified penalties or additions to tax shall be imposed. Section 6015 of the 1954 Code, Appendix A, infra, with certain exceptions not here pertinent, requires every individual to make a declaration of his estimated tax. The Commissioner's notice of deficiency asserted (I-R. 44) that the taxpayer was liable for $1,303.66 because of additions to tax under this section for failure to file declarations of estimated tax for any of the six taxable years, 1956 through 1961. The taxpayer did not dispute this in his petition. At the trial he failed to present any evidence with respect to it, and thus made no explanation whatever as to why he filed no declarations of estimated tax. The Tax Court sustained the Commissioner's determination of liability. (I-R. 129, 141.)

The imposition of additions to tax provided for in Section 6654 of the 1954 Code has frequently been sustained. See, for example, Commissioner v. Acker, 361 U.S. 87; Hansen v. Commissioner, 258 F. 2d 585 (C.A. 9th), reversed on other grounds, 300 U.S. 446; United States v. Steck, 295 F. 2d 682 (C.A. 10th); Woo v. Commissioner, 345 F. 2d 532 (C.A. 5th); Kaltreider v. Commissioner, 255 F. 2d 833 (C.A. 3d). In

the light of the record, which clearly shows that the taxpayer failed to file declarations of estimated tax, it is submitted that the Tax Court correctly affirmed the Commissioner's determination.

CONCLUSION

The decision of the Tax Court was correct on all issues, and should be affirmed.

Respectfully submitted,

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OCTOBER, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1966.

_____
CAROLYN R. JUST
Attorney

APPENDIX A

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) General Rule.--The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

(1) Bona fide resident of foreign country.--In the case of an individual citizen of the United States, who establishes to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; but such individual shall not be allowed as a deduction from his gross income any deductions (other than those allowed by section 151, relating to personal exemptions) properly allocable to or chargeable against amounts excluded from gross income under this paragraph.

(2) Presence in foreign country for 17 months.--In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; but such individual shall not be allowed as a deduction from his gross income any deductions (other than those allowed by section 151, relating to personal exemptions) properly allocable or or chargeable against amounts excluded from gross income under this paragraph. If the 18-month period includes the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed $20,000. If the 18-month period does not

include the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed an amount which bears the same ratio to $20,000 as the number of days in the part of the taxable year within the 18-month period bears to the total number of days in such year.

(b) Definition of Earned Income.--For purposes of this section, the term "earned income" means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, under regulations prescribed by the Secretary or his delegate, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 30 percent of his share of the net profits of such trade or business, shall be considered as earned income.

(26 U.S.C. 1964 ed., Sec. 911.)

SEC. 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE.

(a) In General.--As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means--

* * *

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

* * *

(26 U.S.C. 1964 ed., Sec. 4462.)

SEC. 6015.[9/] DECLARATION OF ESTIMATED INCOME TAX BY INDIVIDUALS.

(a) Requirement of Declaration.--Every individual * * * shall make a declaration of his estimated tax for the taxable year if--

---

9/ Section 6015 was amended by Sec. 5(a) of the Act of September 14, 1960, P.L. 86-779, 74 Stat. 998, effective for the year 1961 in respect not material to this case.

(1) the gross income for the taxable year can reasonably be expected to consist of wages (as defined in section 3401 (a)) and of not more than $100 from sources other than such wages, and can reasonably be expected to exceed--

(A) $5,000, in the case of a single individual other than a head of a household (as defined in section 1 (b) (2)) or a surviving spouse (as defined in section 2 (b)) or in the case of a married individual not entitled to file a joint declaration with his spouse;

* * *

(26 U.S.C. 1964 ed., Sec. 6015.)

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * *

(e) Omission From Gross Income.--Except as otherwise provided in subsection (c)--

(1) Income taxes.--In the case of any tax imposed by subtitle A--

(A) General rule.--If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

* * *

(26 U.S.C. 1964 ed., Sec. 6501.)

SEC. 6512. LIMITATIONS IN CASE OF PETITION TO TAX COURT.

(a) Effect of Petition to Tax Court.--If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency under section 6212 (a) (relating to deficiencies of income, estate, and gift taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or of estate tax in respect of the taxable estate of the same decedent in respect of which the Secretary or his delegate has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except--

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(b) Overpayment Determined by Tax Court.--

(1) Jurisdiction to determine.--If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, in respect of which the Secretary or his delegate determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

(2) Limit on amount of credit or refund.--No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid--

(A) after the mailing of the notice of deficiency, or

(B) within the period which would be applicable under section 6511 (b) (2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment.

(26 U.S.C. 1964 ed., Sec. 6512.)

SEC. 6654. FAILURE BY INDIVIDUAL TO PAY ESTIMATED INCOME TAX.

(a) Addition to the Tax.--In the case of any underpayment of estimated tax by an individual, except as provided in subsection (d), there shall be added to the tax under chapter 1 for the taxable year an amount determined at the rate of 6 percent per annum upon the amount of the underpayment (determined under subsection (b)) for the period of the underpayment (determined under subsection (c)).

* * *

(26 U.S.C. 1964 ed., Sec. 6654.)

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.--If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section

6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency Letters.--If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212 (a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) Amount Assessable Before Decision of Tax Court.--The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212 (c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

* * *

(g) Abatement if Jeopardy Does Not Exist.--The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

* * *

(26 U.S.C. 1964 ed., Sec. 6861.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.262-1 Personal, living, and family expenses.

* * *

(b) Examples of personal, living, and family expenses. Personal, living, and family expenses are illustrated in the following examples:

* * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, § 1.162-2, and paragraph (d) of § 1.162-5 (relating to trade or business expenses), * * * section 212 and § 1.212-1 (relating to expenses for production of income), * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses * * *. Except as permitted under section 162, 212, or 217, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

* * *

(26 C.F.R., Sec. 1.262-1.)

§ 1.446-1 General rule for methods of accounting.

* * *

(b) Exceptions. (1) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation of taxable income shall be made in a manner which, in the opinion of the Commissioner, does clearly reflect income.

* * *

(26 C.F.R., Sec. 1.446-1.)

§ 1.911-1 [as amended by T.D. 6665, 1963-2 Cum. Bull. 27] Earned income from sources without the United States.--

(a) Bona fide resident of a foreign country--* * *

* * *

(8) Declaration of estimated tax. In estimating his gross income for the purpose of making a declaration of estimated tax for any taxable year, a citizen of the United States is not required to take into account income which it is reasonable to believe will be excluded from gross income under the provisions of section 911 (a) (1) and the regulations thereunder.

* * *

(26 C.F.R., Sec. 1.911-1.)

Treasury Regulations on Procedure and Administration (1954 Code):

§ 301.6501(e)-1 Omission from return.

(a) Income taxes--(1) General rule. (i) If the taxpayer omits from the gross income stated in the return of a tax imposed by subtitle A of the Code an amount properly includible therein which is in excess of 25 percent of the gross income so stated, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(ii) For purposes of this subparagraph, the term "gross income", as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of such sales or services. An item shall not be considered as omitted from gross income if information, sufficient to apprise the district director of the nature and amount of such items, is disclosed in the return or in any schedule or statement attached to the return.

* * *

(26 C.F.R., Sec. 301.6501(e)-1.)

Rev. Rul. 55-171, 1955-1 Cum. Bull. 80, 87:

* * *

Sec. 7. Earned Income.

.01 Compensation for personal services rendered.--The term "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered. It does not include such income as dividends, other distributions of corporate earnings or profits, gambling gains, interest, rents, or gains or profits from dealing in real or personal property. * * *

* * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL A. ROBIDA, Petitioner	)	
v.	)	No. 20,592
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

MOTION OF RESPONDENT TO REMAND THE CASE TO THE TAX COURT

Comes now the Commissioner of Internal Revenue, the Respondent herein, by his counsel of record, and respectfully moves this Court as follows:

WHEREAS,

1. This case involves deficiencies in income taxes for the years 1956 through 1961 totalling $46,559.55, from income which the Tax Court found had been derived by the taxpayer from gambling with slot machines while traveling abroad during the years in question. The Tax Court sustained the Commissioner's computation of the deficiencies by the net worth plus nondeductible expenditure method and rejected the taxpayer's primary contention that he had received the money as compensation for services rendered outside the United States while allegedly teaching others to diagnose and manipulate slot machines so as to collect jackpots.

2. The taxpayer has filed a petition for review with this Court from the Tax Court's decision in favor of the Commissioner; the brief on behalf of the taxpayer was received on June 21, 1966, and the brief

on behalf of the Commissioner is now due on July 21, 1966.

3. The principal contention of the taxpayer's brief (pp. 2-13) is that he was unable to prove his case before the Tax Court, where he was not represented by counsel, allegedly because he did not have certain personal records which had been seized by the German police when he was expelled from Germany in 1963.

4. Counsel for Respondent has been informed by the Chief Counsel of the Internal Revenue Service that its San Francisco office, prior to the Tax Court trial, made copies of all such records (i.e. certain diaries of the taxpayer) then in its possession available to the petitioner for his inspection; that petitioner inspected the documents; and that petitioner was advised that he could make use of them at the trial if he so desired.

5. On May 13, 1966, prior to the filing of the taxpayer's brief, counsel for the Respondent, despite the fact that the material is not of record in this case, furnished the taxpayer's counsel with a xeroxed copy of photostats of such diaries of the taxpayer during the taxable years, transmitted with the Internal Revenue Service files in this case. (See Appendix B of the taxpayer's brief.) This action was taken mainly because the taxpayer was not represented by counsel before the Tax Court.

6. On receipt of the taxpayer's brief, which simply reprints (Appendix B) Respondent's transmittal letter of May 13, 1966, counsel for Respondent, on June 22, 1966, telephoned counsel for the taxpayer and indicated, in the interest of complete fairness, a willingness that the case be remanded to the Tax Court to enable the taxpayer to offer

into evidence and to testify concerning such portions, or all, of the copies of the diaries which he believes may be relevant to his case.

NOW THEREFORE,

Counsel for the Respondent with the concurrence of the Chief Counsel of the Internal Revenue Service hereby moves that this Court enter an order remanding the case to the Tax Court to permit the taxpayer to offer and testify concerning the aforementioned material in proceedings therein; and

IN THE ALTERNATIVE, in the event this Court should deny the aforesaid Motion, the Commissioner of Internal Revenue, by his counsel of record, respectfully moves that this Court extend the time for filing the brief on behalf of the Respondent for 60 days, or until September 19, 1966, * * * .

MITCHELL ROGOVIN
Assistant Attorney General
Counsel for the Respondent

Dated: June 24, 1966.

[Caption Omitted]

ANSWER OF THE COMMISSIONER TO PETITIONER'S MOTION IN OPPOSITION TO MOTION TO REMAND AND MOTION FOR FINAL JUDGMENT

Comes now the Commissioner of Internal Revenue, the Respondent herein, by his counsel of record, and respectfully states to this Court as follows:

1. The taxpayer has misinterpreted the Commissioner's motion to remand the case to the Tax Court, and is endeavoring to have the taxpayer's appeal decided without the benefit of the Commissioner's brief or oral argument. The Commissioner has never confessed error in this case and he stands ready to file his brief and present oral argument in the event this Court should enter an order that the Commissioner proceed to brief the case in accordance with paragraph 5(b) herein. There is, of course, no reason for the Commissioner to seek a new trial, as alleged, inasmuch as the Tax Court has decided the case in the Commissioner's favor.

2. The taxpayer has misrepresented both the facts and the law. The Commissioner's abandonment, prior to trial in the Tax Court, of the claim for a 50% fraud penalty for the taxable years 1956 through 1961, originally made in the notice of deficiency dated September 18, 1962 (R. I-43), did not in any way affect the deficiency in tax totalling $46,559.55 claimed for those years. The Commissioner has never abandoned his claim as to the deficiency for those years, nor has he ever abandoned the determination that there were grounds for jeopardy assessment, entirely apart from the abandoned claim for fraud.

3. That the notice of deficiency was not based on any of the material seized from the taxpayer by the German police is clearly shown by the fact that such notice is dated September 18, 1962 (R. I-43) and that the seizure of the taxpayer's records by the German police was not until July, 1963 (R. 41). In fact, the opening net worth used in the Commissioner's computation of the taxpayer's deficiencies for 1956

through 1961 is the same figure agreed upon as the closing net worth for 1955 in a prior case settled with the taxpayer involving the years 1949 through 1955. (R. 36.)

4. With respect to the xerox copies of certain photostats of the taxpayer's notebooks seized by the German police, there is attahced hereto an affidavit from Eugene H. Cirrani, Esq., the attorney with the Internal Revenue Service who tried the case in the Tax Court, which shows what material he had received prior to the trial in the Tax Court. The circumstances of the taxpayer's incarceration in Germany are entirely irrelevant to the instant tax case. The originals of the five notebooks were not received from Germany until May, 1966, as shown by the certified copies of letters from the files of the Internal Revenue Service, also attached, when they were requested in connection with a pending suit for refund involving years subsequent to those here in issue. The notebooks are clearly marked "Property of Daniel A. Robida", and a comparison of the photostats and the xerox copies of the photostats with the originals discloses that the xerox copy furnished to the taxpayer's attorney was complete and in the exact order of the originals with the exception of blank pages in the notebooks. Mr. Ciranni's affidavit also confirms the manner in which the taxpayer was permitted to inspect the photostats of the notebooks and that he declined to identify them as his. The taxpayer should not be permitted to obtain a reversal of the Tax Court's judgment affirming the Commissioner's notice of deficiency by a mere failure to identify his own records.

5. (a) The Commissioner desires to give the taxpayer every opportunity to offer into evidence and to testify concerning such portions, or all, of the diaries which he may believe to be relevant to his case, particularly since he was not represented by counsel before the Tax Court. For this reason, the Commissioner reiterates his motion that this Court remand the case to the Tax Court to give the taxpayer full opportunity to make whatever use he can make of his records, now that he is represented by counsel.

(b) The Commissioner is entirely satisfied with the record which was made in the Tax Court, and we believe the Tax Court was correct in sustaining the deficiencies. If the taxpayer's motion in opposition to remand should be interpreted to mean that the taxpayer does not wish to take advantage of the opportunity to present further evidence from his note books which have been made available to him and that he wishes to have his liability determined on the basis of the record made in the Tax Court, then, in the alternative, in view of the delay incurred by the taxpayer's motion in opposition to remand, the Commissioner respectfully moves thatthis Court extend the time for filing the brief on behalf of the Commissioner until 30 days after receipt of an order that such brief be filed.

(c) The taxpayer's motion for final judgment should in either event be denied.

Respectfully submitted,

/s/ Mitchell Rogovin
MITCHELL ROGOVIN
Assistant Attorney General
Counsel for the Commissioner

August 22, 1966.

* * *

[Caption Omitted]

AFFIDAVIT

tate of California)
) ss
ounty of San Francisco)

I, Eugene H. Ciranni, being first duly sworn, depose and say:

1. THAT I am an attorney in the San Francisco Regional Counsel's ffice, of the Internal Revenue Service;

2. THAT I had primary responsibility for the trial of the above- ntitled case in the Tax Court of the United States;

3. THAT three envelopes, marked "A", "B", and "C", were a part f the official case file in this matter;

4. THAT the envelope marked "A" contained photostatic copies f five notebooks or diaries each containing, among other entries, he statement "property of Daniel A. Robida";

5. THAT the envelope marked "B" contained photostatic copies of orrespondence between Daniel A. Robida and certin Swiss banks;

6. THAT the envelope marked "C" contained photostatic copies f correspondence of a personal nature between Daniel A. Robida and thers, some of which made reference to his United States individual ncome tax returns for the years 1956, 1960, and 1962;

7. THAT according to written memoranda contemporaneously pre- ared by affiant with respect to conferences held between Daniel A. obida and affiant, which memoranda are a part of the official files n this matter, Daniel A. Robida was advised by affiant:

(a) THAT photostatic copies of five diaries of Daniel A. Robida were in the official Internal Revenue Service files;

(b) THAT Daniel A. Robida could examine such photostats whenever he wished and could rely on them in any manner; but

(c) THAT the affiant, acting on behalf of the Commissioner, could not introduce such photostats into evidence because the photostats were not properly authenticated and because Daniel A. Robida would not stipulate as to the accuracy of such photostats;

8. THAT Daniel A. Robida did in fact examine such photostats in the presence of affiant, in the office of affiant, on September 16, 1964, September 22, 1964, and October 13, 1964, and he took notes from those photostats on each of those occasions.

9. THAT the original diaries of Daniel A. Robida from which the photostats in the envelope marked "A" were taken, were not in the possession of the affiant either prior to or during the Tax Court trial, and in fact have never been seen by the affiant, and

10. THAT prior to the trial of this case affiant suggested to Daniel A. Robida on several occasions that he stipulate that the photostatic copies of the diaries contained in the envelope marked "A" were, in fact, accurate copies of his original diaries, but he refused to do so.

/s/ Eugene H. Ciranni
Eugene H. Ciranni
Attorney

Subscribed and sworn to before me this seventeenth day of August, 1966.

/s/ Marjorie S. Hamburger
Notary Public in and for the
City and County of San
Francisco, State of California
My Commission Expires Sept. 24,

EMORANDUM
REGISTERED - AIR MAIL

O: Associate Chief, Appellate Division DATE: AUG 15 1963
San Francisco, Calif. - AP:SF:AS:RWM

ROM: Office of International Operations
National Office (CP:IO:3:HWD)

UBJECT: Daniel A. Robida
Last known forwarding address:
c/o American Express Company
30 Wilhelmstrasse
Wiesbaden, Germany

With reference to our recent correspondence with your office in regard to the above-named taxpayer, there is transmitted herewith the material in the form of photostats made available by the Army and Air Force to our London office, as follows:

Contents of taxpayer's notebooks (5) - Envelope A

Correspondence between taxpayer and Swiss banks - Envelope B

Other correspondence and copies of taxpayer's returns for 1956, 1960, and 1962 - Envelope C.

/s/ H. W. Driscoll

Attachments

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C.

March 14, 1966

RMR:JF:WAMiner:ldb
5-11-2442

Honorable Mitchell Rogovin
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224

Re: Daniel A. Robida v. United States
Civil No. 44081 - ND California
Your ref: CC:RL-6597 S:HHPlaut/lp

Dear Mr. Rogovin:

With reference to the photostat copies of the diaries of Mr. Robida, previously furnished this office, it is requested that you ascertain the whereabouts of the originals of these diaries. If the originals are unavailable we must know this in order that we may so inform the Court in preparation for the introduction of the photostats as secondary evidence.

Sincerely yours,

RICHARD M. ROBERTS
Acting Assistant Attorney General
Tax Division

By:
JEROME FINK
Chief, Refund Trial Section No. 3

MEMORANDUM
CC:RL-6597 S:HHPlaut/lp

TO: DIRECTOR OF INTERNATIONAL OPERATIONS DATE: MAR 17 1966
CP:IO:3:HBH

FROM: REFUND LITIGATION DIVISION

SUBJECT: Daniel A. Robida v. United States
Civil No. 44081 (ND Calif.)

We would appreciate it if you would comply with the request of the Department of Justice contained in their letter dated March 14, 1966, a copy of which is enclosed herewith.

We have had previous correspondence in this matter. Please refer to your memoranda of January 25, 1966, January 26, 1966 and February 18, 1966.

Your reply should be forwarded to this office for transmittal to the Department of Justice.

/s/ Jerome D. Sebastian
Jerome D. Sebastian
Chief, Special Income Tax Branch

Encl. No. 30:
copy of letter dated 3-14-66

MEMORANDUM

TO: Office of International Operations Date: 14 APR 1966 (66-
CP:IO:3:HBH

FROM: Revenue Service Representative - Bonn
CP:IO:307 /s/ JLC

SUBJECT: Daniel A. Robida v. United States
Civil No. 44081 ND Calif.

The original diaries of Robida were delivered by the Wiesbaden police to the States Attorney in that city on December 14, 1964. A check on the whereabouts and availability of these diaries is now being made in the States Attorney's office and we will be advised of the results in the near future.

MEMORANDUM
REGISTERED

TO: Office of International Operations DATE: 3 MAY 1966 (66-98)
CP:IO:3:HBH

FROM: Revenue Service Representative - Bonn
CP:IO:307 /s/ JLC

SUBJECT: Daniel A. Robida v. United States

Transmitted herewith are the five notebooks or diaries seized from Robida by the Wiesbaden police. The letter from the Department of Justice to the Chief Counsel did not indicate any necessity for certification of these documents, so I assume Mr. Dody of O.S.I. or Mr. Hayes of C.I.D. will be able to identify them if they are offered in evidence by the Government.

Attachments - 5

MEMORANDUM

TO: Director, Refund Litigation Division
Office of Chief Counsel
CC:RL:S - H.H. Plaut

DATE: MAY 10 1966

FROM: Director of International Operations
CC:IO:3:HBH

SUBJECT: Daniel A. Robida v. United States
Civil Number 44081 (ND Calif.)

Transmitted herewith are the five notebooks or diaries seized from Daniel A. Robida by the Wiesbaden, Germany police.

/s/ C. d. Fox

Attachment